

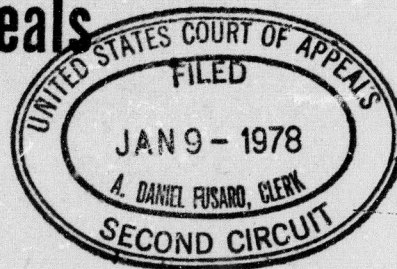
***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

No. 77-6172

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE, *Plaintiff-Appellant*,

v.

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS, as Secretary of
Transportation, JOHN J. FEARNSIDES, as Acting Director,
Materials Transportation Bureau, ALAN I. ROBERTS, as Acting
Director, Office of Hazardous Materials Operations, and
ENGINEERING PRODUCTS OF CANADA, LTD., *Defendants-Appellees*.

REPLY BRIEF FOR APPELLANT

LORD, DAY & LORD
25 Broadway
New York, New York 10004

WILLIAM W. SCOTT
RICHARD E. SCHWARTZ
COLLIER, SHANNON, RILL, EDWARDS & SCOTT
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Attorneys for Plaintiff-Appellant

November 18, 1977

TABLE OF CONTENTS

Authorities Cited	ii
Introductory Statement	1
Argument	3
I. SECTION 1804(a) DOES NOT AUTHORIZE DOT'S LICENSING PROCEDURE, WHICH EXCEEDS DOT'S STATUTORY AUTHORITY	3
II. ACMC HAS STANDING TO BRING THIS ACTION	5
A. ACMC Meets the Supreme Court's Two-Pronged Test for Standing	5
B. Competitors Have Standing	5
C. Economic Harm Which Will Occur in the Future is Sufficient "Injury in Fact"	7
D. ACMC's Participation in the Regulatory Process Makes It an Appropriate Plaintiff to Guard that Right in this Court	9
III. THE PUBLIC PARTICIPATION ISSUE HAS BEEN RAISED BEFORE DOT PRIOR TO THIS LITIGATION	10
A. ACMC Members Raised This Issue During The Rulemaking Proceeding	10
B. ACMC Itself Raised This Issue Before The Licensing Process Began	10
C. DOT Must Be Deemed To Have Denied ACMC's Request For Public Participation When It Issued A License To Engineering Products of Canada, Ltd.	11
CONCLUSION	12

AUTHORITIES CITED

CASES:

Aberdeen and Rockfish R. Co. v. Students Challenging
Regulatory Agency Procedures, 412 U.S. 699 (1973)

Alabama Power Company v. Ickes, 302 U.S. 464 (1938)

American Maritime Association v. Michael Blumenthal
No. 77-1508 (D.D.C., October 14, 1977)

Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970)

Association of Dairy Processing Service Organizations v.
Camp, 397 U.S. 150 (1970)

Environmental Defense Fund v. Hardin, 428 F.2d 1093

Greene County Planning Board v. FPC, 455 F.2d 412
(2d. Cir. 1972)

Investment Company Institute v. Camp, 401 U.S. 617
(1971)

Law Motor Freight v. Civil Aeronautics Board, 364
F.2d 139 (1st Cir. 1966)

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)

Morgan Associates v. United States Postal Service
511 F.2d 1223 (1975)

Norwalk CORE v. Norwalk Redevelopment Agency
395 F.2d 920 (2d Cir. 1968)

Portland Cement Association v. Ruckelshaus
486 F.2d 375 (D.C. Cir. 1973)

Scanwell Laboratories v. Shaffer, 424 F.2d 859
(D.C. Cir. 1972)

Sierra Club v. Morton, 405 U.S. 727 (1972)

Union Carbide Corp. v. Train, 73 F.R.D. 620
(S.D.N.Y. 1977)

STATUTES:

5 U.S.C. §704

5 U.S.C. §706(2)(C)

7 U.S.C. §2133

7 U.S.C. §2142

15 U.S.C. §682(c)

16 U.S.C. §797(e)

22 U.S.C. §503

30 U.S.C. §208

33 U.S.C. §1342

42 U.S.C. §6925

47 U.S.C. §307

49 U.S.C. §1372

49 U.S.C. §1804(a)

49 U.S.C. §1808(a)

MISCELLANEOUS:

49 C.F.R. §173.300a

49 C.F.R. §173.300b

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE,

Plaintiff-Appellant,

v.

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS,
as Secretary of Transportation, JOHN J. FEARNSIDES,
as Acting Director, Materials Transportation Bureau,
ALAN I. ROBERTS, as Acting Director, Office of
Hazardous Materials Operations, and ENGINEERING
PRODUCTS OF CANADA, LTD.,

Defendants-Appellees.

REPLY BRIEF FOR APPELLANT

Introductory Statement

This brief is the reply of appellant American Cylinder Manufacturers Committee ("ACMC") to the brief for appellees Department of Transportation, Brock Adams, John Fearnside, and Alan Roberts (hereinafter collectively referred to as "DOT"). DOT's brief presents a misleading picture of ACMC's position in this appeal, which may be summarized as follows:

1. DOT implies that we believe that the underlying regulations (49 C.F.R. §173.300 a and b) are valid. We do not. We admit only that DOT used the proper procedures when it issued them. We contend that DOT has no authority to issue regulations which empowers it to issue licenses privately. To the extent that these regulations purport to confer such authority they are invalid. We dispute DOT's contention that the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §1804 (a) empowers it to do so.

2. ACMC has standing to bring this action because its members are competitors of the actual and potential licensees. Additionally, ACMC's members have actively participated not only in the rulemaking which led to the disputed regulations, but also in virtually every phase of the regulation of compressed gas cylinders. Its members have been the source of many DOT safety standards. Thus, ACMC is an appropriate "private attorney general" to invoke the statutory right of the public to participate in this regulatory process.

3. Contrary to DOT's assertions, ACMC's contention regarding public participation has been raised previously before the agency: it was raised during the rulemaking proceeding by ACMC's members and it was raised by ACMC before the licensing process began. In July, 1976 DOT assigned a petition docket number to ACMC's request for public procedures. This petition was effectively denied a year later when the first license was issued without any public procedures.

ARGUMENT

I. SECTION 1804(a) DOES NOT AUTHORIZE DOT'S LICENSING
PROCEDURE, WHICH EXCEEDS DOT'S STATUTORY AUTHORITY

ACMC pointed out in its initial brief that DOT's authority to issue the disputed licenses must be expressly conferred by statute. ACMC Brief at 15. We contended that no statute authorizes DOT to issue these licenses without some public procedures so these licenses are invalid. In particular, we pointed out that §1804(a) could not authorize the issuance of these licenses because:

1. Section 1804(a) authorizes DOT only to issue regulations, and licenses are not regulations;
2. Under the bifurcated scheme of the HMTA, §1804(a) safety regulations are enforced under other sections of the HMTA, and these licenses are an enforcement mechanism for §1804(a) safety regulations.

DOT's only response to our argument is (in its entirety):

DOT is surely able to follow the approval mechanism set forth in its valid regulations. Its authority to adopt regulations--and to carry out their mandate--explicitly appears in 49 U.S.C. §1804(a).
DOT Brief at 19.

Contrary to DOT's assertion, we can find no language in §1804(a)--

"explicit" or otherwise--which authorizes DOT to issue licenses privately. ^{1/}

1/ Section §1804(a) provides:

The Secretary may issue, in accordance with the provisions of section 553 of Title 5 including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who

(Continued on page 4)

Section 1804(a) authorizes DOT only to issue regulations, and then only after public notice-and-comment. In contrast, statutes which authorize agencies to issue licenses say so explicitly.^{2/}

For the reasons set forth in our initial brief (pages 14 - 20), we submit that neither §1804(a) nor any other statute authorizes DOT to issue these licenses privately; that DOT's regulations are invalid insofar as they purport to authorize DOT to issue these licenses privately; and that consequently DOT's action is beyond its statutory authority and must, therefore, be set aside. 5 U.S.C. §706(2)(C).

1/ (Footnote Cont. from page 1)

manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing or testing of a package or container which is represented, marked certified, or sold by such persons for use in the transportation of certain hazardous materials.

2/ See the following statutes which explicitly authorize federal agencies to issue licenses for specific purposes: 7 U.S.C. §2133 ("The Secretary [of Agriculture] shall issue licenses."); 7 U.S.C. §2142 ("The Secretary [of Agriculture] is also authorized to require the licensing.."); 15 U.S.C. §682(c) ("the [Small Business] Administration may...issue the company a license...."); 16 U.S.C. §797(e) ("The [Federal Power] Commission is authorized and empowered--...To issue licenses..."); 22 U.S.C. §503 ("the Secretary of Commerce...is authorized to issue the licenses..."); 30 U.S.C. §208 ("the Secretary of the Interior may... issue limited licenses or permits..."); 33 U.S.C. §1342 ("the Administrator [of the Environmental Protection Agency] may...issue a permit ..."); 42 U.S.C. §6925 ("the Administrator [of the Environmental Protection Agency] (or the State) shall issue a permit..."); 47 U.S.C. §307 ("the [Federal Communications] Commission...shall grant to any applicant therefor a station license..."); 49 U.S.C. §1372 ("The [National Transportation Safety] Board is empowered to issue such a permit...").

II. APMC HAS STANDING TO BRING THIS ACTION.

A. APMC Meets the Supreme Court's Two-Pronged Test for Standing.

APMC meets the two-pronged test for standing which the Supreme Court first enunciated in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970): "injury in fact" and "whether the interest sought to be protected by the complaint is within the zone of interest ^{1/} to be protected or regulated by the statute or constitutional guarantee in question." Id. at 153. APMC alleges that it is being injured economically as a competitor, and it also alleges that it is being denied its statutory right to participate in the regulatory process.

The government argues that APMC's competitive injury cannot confer standing, that APMC's alleged injury from increased competition is speculative (Appellee's Brief at 21 - 24), and apparently misunderstands the relevance of APMC's past participation in the regulatory process.

B. Competitors Have Standing.

The government completely ignores the fact that APMC alleges injury from unlawful competition (Appellant's Brief at 33). Instead, it reiterates its argument that "economic injury resulting from governmental action which fosters lawful competition does not in itself confer standing, "(Appellee's Brief at 21, emphasis added) and invokes the Perkins case which has been overruled. In a lengthy footnote (Appellee's Brief at 21), the government introduces the concept

^{1/} We have previously pointed out that the "zone test" has come under increasing attack, Appellant's Brief at 33 n.1.

of "constitutional legislation" to justify its invocation of Perkins. Both the concept and the case are irrelevant because ACMC alleges a statutory (not constitutional) basis for standing.

The government attempts to distinguish Scanwell by claiming that its holding is limited by Machinery Dealers National Association, Dkt. No. 75-1958 (D.C. Cir., August 25, 1977). In Scanwell, the thrust of the disappointed bidder's claim on the merits was to satisfy the public interest in having agencies follow the regulations which control government contracting. The disappointed bidder, who had no right to have the contract awarded to him if there were illegality in the contract award, was "brought within the zone of interest" as a "private attorney general". Scanwell supports ACMC's contention that its competitive injury will support an action brought as a "private attorney general" to challenge the denial of the public's right to participate in the DOT licensing procedures.

The government emphasizes with italics that Scanwell has "not" been adopted in this Circuit. With barely a nod of recognition to Union Carbide Corp. v. Train^{1/} which the government acknowledges as "the progeny" of Scanwell, it cites Morgan Associates v. United States Postal Service, 511 F.2d 1223 (1975), as if to say that this Circuit rejected Scanwell in that opinion. That Scanwell is not adopted in Morgan is true as far as it goes. In point of fact, the court stated, "We affirm the judgment for appellee without passing upon the standing issue." Id. at 1225, (emphasis added). Scanwell is mentioned only in the footnote to this sentence, in which the court concluded that it would refrain from deciding the applicability of Scanwell "until a case more compelling on the

^{1/} Union Carbide Corp. v. Train, 73 F.R.D. 620 (S.D.N.Y. 1977)

merits comes before us." The government completely disregards that Scanwell has been followed by the United States Supreme Court in at least two instances, Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) and Investment Company Institute v. Camp, 401 U.S. 617 (1971).

C. Economic Harm Which Will Occur in the Future is
Sufficient "Injury in Fact"

Machinery Dealers (MDNA) is distinguishable from the case at bar. The Court in MDNA stated that the trade association's standing depended on a "demonstration that one or more of its members have suffered an "injury in fact." Slip op. at 11." In stating the test for "injury in fact", it required a claimant to "show a substantial probability that the requested relief would benefit him in some perceptible, tangible fashion." Slip. op. at 12. The court could not find injury in fact to MDNA based on the government's failure to advertise for competitive bidding because MDNA was neither engaged in nor contemplated participation in a business project which had sufficient resources and the intent to purchase the entire plant bid for. Slip op. at 18. Furthermore, MDNA's standing could not be predicated upon its members' loss of business due to increased competition from Lockheed's sale of some of the machinery from the plant. There was no evidence that Lockheed regularly competed with MDNA members in the machinery resale market nor that in the regular course of business Lockheed made such sales. Slip op. at 22. MDNA was denied standing because the alleged injury to its members in selling used industrial machinery to Lockheed "was too speculative to support a finding that rescission of the sale would remedy the claimed harm." Slip op. at 17.

It should be remembered that this is an action for declaratory relief. ACMC's alleged injuries are not speculative when compared to the allegations of MDNA. There is no doubt that introduction of foreign cylinders into the United States cylinder market would increase competition by providing prospective cylinder buyers with alternative sources of supply. That such injury has not yet occurred makes it no less a threat to ACMC's members, and declaratory relief is sought precisely because the harm is prospective in nature. The alleged threats to the safety of the American cylinder industry are likewise prospective but no less true. The purpose of declaratory relief is to obviate harm which has not yet occurred. That the government would apparently deny ACMC standing until these injuries actually occur is contrary to the very nature of an action for declaratory relief. Furthermore, the alleged harm to ACMC resulting from the denial of its right to participate in the licensing procedures is a concrete injury which has occurred: two such licenses have already been issued.

Recently, the United States District Court for the District of Columbia applied the MDNA "injury in fact" test in deciding the standing question in American Maritime Association v. Blumenthal, No. 77-1508 (D.D.C. October 14, 1977). The plaintiffs were three associations of shipowners, shipbuilders, and seamen respectively. Each based its standing on potential injury to its members if the Alaskan oil trade were not restricted to ships qualified under the Jones Act. None of the associations represented all of those in its sector who might be injured. In finding that all of the plaintiffs had standing the court stated:

"Since it is impossible to determine in advance which particular shipowner, shipbuilder, or seamen will be harmed in the individual instance, it is not possible

to state with certainty which of the members in the plaintiffs' associations will be harmed. Such a showing, however, is not required. [MDNA] requires only a showing that the plaintiffs are within the class of persons whose interests are necessarily, or with substantial probability affected by the challenged agency action." American Maritime Association at 9.

In keeping with the American Maritime Association opinion which follows MDNA, ACMC need not prove future injury with absolute certainty. ACMC has, however, met the MDNA injury in fact test by showing "a substantial probability that the requested relief would benefit [its members and the public] in some perceptible, tangible fashion."

D. ACMC's Participation in the Regulatory Process Makes It an Appropriate Plaintiff to Guard that Right in this Court.

ACMC alleges a right to participate in the licensing procedures (Appellant's Brief at 28 - 9), and it is the denial of this right to participate which alternatively satisfies the "injury in fact" requirement. The HMTA confers upon the public the right to participate to protect the public safety. ACMC's members are among those members of the public who most frequently (and, we believe, beneficially) exercise that right. Furthermore, ACMC's members perform an important technical role in the Compressed Gas Association which includes users of cylinders who are vitally interested in the safety of the manufacturing process, and who are also being denied their right to participate in the licensing process. The denial of the right to participate at the licensing stage amounts to injury in fact, and the nature of ACMC's members' past participation in this entire regulatory process demonstrates an interest which extends beyond its stake as a competitor.

ACMC has standing to bring this action.

III. THE PUBLIC PARTICIPATION ISSUE HAS BEEN RAISED BEFORE DOT PRIOR TO THIS LITIGATION.

A. ACMC Members Raised This Issue During The Rulemaking Proceeding.

DOT contends that ACMC may not raise the "public participation" issue in this litigation because ACMC never asserted it in the rulemaking proceeding. DOT Brief at 26. However, ACMC's members on whose behalf this action was brought did raise this issue during the rulemaking.

For example, Union Carbide Corporation, in comments to DOT dated October 28, 1971 when it was an ACMC member, stated:

[I]t is imperative that appropriate procedures be established whereby the Board could properly assess applications for approval of cylinder manufacturers and inspectors, and determine whether such manufacturers and inspectors are capable of continuous compliance in all respects with the requirements of the Board's regulations. To the extent possible, it would be desirable for such procedures to continue the traditional participation by cylinder users in the approval process without, of course, usurping the prerogatives of government. (emphasis added)

Thus, Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), which was cited by the government, is inapposite because in Portland Cement the issues presented to the Court were never raised before the agency by anyone.

B. ACMC Itself Raised This Issue Before The Licensing Process Began.

DOT has admitted that ACMC raised the issue of public participation in the licensing process in a letter to DOT within three months after the final regulations were published (DOT Brief at 26) and before the licensing process had begun.

The final regulations implied to ACMC that participation would be afforded interested persons because the word "investigation" was used in describing the manner in which DOT shall determine the fitness of prospective licensees. See 49 C.F.R. §§173.300a(d), §173.300b(d).^{1/} In a letter from DOT to ACMC on October 6, 1971, the term "investigation," as used by DOT in the preamble to its Federal Register notice on Docket No. HM-74 (36 Fed. Reg. 11224 (June 10, 1971)), was defined as follows:

The term "investigation" was meant to include the evaluation of the materials supplied in the public hearing, discussions with persons within the Department, and the general expertise of DOT personnel serving the Board. Letter from L. W. Bierlien to ACMC, October 6, 1971. [emphasis supplied].

Therefore, ACMC reasonably believed that DOT's use of the term "investigation" in the finalized regulations indicated that participation in the licensing process was contemplated. It appeared to ACMC that the proper time to suggest a means of conducting the required "investigation" was prior to the beginning of the licensing process.

C. DOT Must Be Deemed To Have Denied ACMC's Request For Public Participation When It Issued A License To Engineering Products of Canada, Ltd.

As explained above, the issue of the proper licensing procedures has been raised before the agency. DOT assigned Rulemaking Docket No. P-548 to ACMC's request to permit public participation in the licensing process. This request was effectively denied when the first license was issued. As the District

^{1/} Both 49 C.F.R. §§173.300a and b state:

If, on the basis of the information submitted in the application and his own investigation, the Director, OHMO, finds that the applicant is qualified...[he may grant a license]. 49 C.F.R. §173.300a(d), §173.300b(d).

of Columbia Circuit has explained:

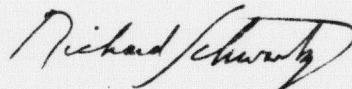
Clearly relief delayed is not always equivalent to relief denied . . . But when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief. Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1099 (1970).

Review of the DOT licensing procedures can be predicated upon DOT's unlawful issuance of a license because such action constitutes "final agency action" reviewable pursuant to 5 U.S.C. §704. See Greene County Planning Board v. FPC, 455 F.2d 412, 426 (2d. Cir. 1972).

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,



WILLIAM W. SCOTT

RICHARD E. SCHWARTZ

SUSAN BASS NEALON

Collier, Shannon, Rill, Edwards & Scott
1055 Thomas Jefferson Street, NW
Washington, DC 20007
(202) 337-6000

Lord, Day & Lord
25 Broadway
New York, NY 10004

Attorneys for American Cylinder
Manufacturers Committee

January 3, 1978

CERTIFICATE OF SERVICE BY MAIL

I, Robert Hirschfeld, an agent of the law printing firm of Byron S. Adams, Inc. of Washington, D.C., being of mature age and familiar with the requirements of service of briefs and other similar legal documents, do hereby certify that on this 3rd day of January, 1978, two copies of a document entitled

IN THE
UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE, Plaintiff-Appellant,

v.

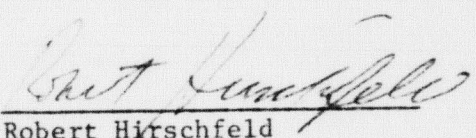
DEPARTMENT OF TRANSPORTATION, BROCK ADAMS, as Secretary of
Transportation, JOHN J. FEARNSIDES, as Acting Director,
Materials Transportation Bureau, ALAN I. ROBERTS, as Acting
Director, Office of Hazardous Materials Operations, and
ENGINEERING PRODUCTS OF CANADA, LTD., Defendants-Appellees.

REPLY BRIEF FOR APPELLANT

were served on the following persons, who have been represented to me as opposing counsel in said action, by first class mail, with proper postage applied and deposited in a mail box of the United States Postal Service:

John Collins, Esq.
Reboul, MacMurray, Hewitt, Maynard &
Kristol
75 Rockefeller Plaza
New York, New York 10019

Richard N. Papper, Esq.
Assistant U.S. Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007


Robert Hirschfeld
1213 K Street, N.W.
Washington, D.C. 20005
202/347-8203